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No. 99-977

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ELEANOR SEBASTIAN, *et. al.*,
Petitioners,

v.

THE UNITED STATES,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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8pp

TABLE OF CONTENTS

	Page
Argument	1
Conclusion	4

TABLE OF AUTHORITIES

CASES: Page

Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971) ... 3
United States v. Larionoff, 431 U.S. 864, 879 (1977) ... 2-3
United States v. Winstar Corp., 518 U.S. 839 (1996) ... 2

OTHER MATERIALS:

5 U.S.C. § 301 ... 3
H.R. Rep. No. 532, 105th Cong., 2d Sess. 314 ... 3
Hearings on CHAMPUS and Military Health Care Before the Subcomm. No. 2 of the House Comm. on Armed Services, 93rd Cong., 2d Sess. 139-140 (1974) ... 4
Brief of the United States in the combined cases of *Mobil Oil Exploration & Producing Southeast Inc. v. United States*, No. 99-244, and *Marathon Oil Co. v. United States*, No. 99-253 ... 2

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Petitioners, Eleanor Sebastian, Lewis Hinson, Robert Lowery, Charles W. Newhouser, Dennis Reynolds, Herbert Brown, Rudolph Singleton, James K. Rogers, Blane K. Lawson, Louie Hinson, Woody Nesbitt, Marion Pearson, Ronald D'Anella, Walter Ewing, Leonard Bartlette, and the Coalition of Retired Military Veterans, respectfully submit this reply brief to respondent's brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit. The Government does not provide any grounds to deny the petition for a writ of certiorari and, accordingly, for the reasons set forth in petitioners' petition and this reply brief, the Court should grant this petition.

ARGUMENT

Stripped to its essence, the United States' brief in opposition to the petition is little more than a variation of the troubling, but

recurring, theme that the Government is not accountable for its promises. *See, e.g., United States v. Winstar Corp.*, 518 U.S. 839 (1996); Brief of the United States in the combined cases of *Mobil Oil Exploration & Producing Southeast Inc. v. United States*, No. 99-244, and *Marathon Oil Co. v. United States*, No. 99-253. Here, the Government in effect contends that "we promised to provide lifetime medical care upon retirement to career members of the Armed Forces but we deny that this promise created any obligations on our part if we later choose not to provide such health care." However, just as the government cannot make "illusory promises" with regard to its contractual obligations, *Winstar*, 518 U.S. at 921 (Scalia, J., concurring), it here cannot deny that its promises of medical care created a property right for petitioners.

That is, although the Government argues at length that the identified health care regulations do not "unconditionally" promise medical care for military retirees, in fact they do. For example, the Government concedes that the MEDMAN from 1947 through 1957 provided that retired servicemen "shall" be admitted to Navy hospitals upon application. Gov. Br. at 14-15. Similarly, Air Force regulations from 1951 through at least 1966 provided that Air Force retirees who would benefit from treatment (as opposed to those merely needing custodial care) were entitled to treatment. Pet. at 11 n. 3.

The Government elides these regulations and argues that, at most, they would have provided an entitlement to medical care only while they were in effect and that there was nothing that precludes them from being subsequently altered. Gov. Br. at 15. This is absolutely incorrect: At a minimum, those military retirees who, with the authorization of the appropriate military department secretary, were promised lifetime medical care as an inducement to career service while these regulations were in effect, were entitled to continued medical care as part of their compensation for their services. The position of the United States is simply contrary to the holding of *United States v.*

Larionoff, 431 U.S. 864, 879 (1977) (finding that serious constitutional questions would be present "for Congress to deprive a service member of pay due for services already performed, but still owing").

Interestingly, the United States does not dispute the national importance of the question presented by this case. As developed in the brief *Amici Curiae* of The Retired Officers Association and Twenty-Nine Other Uniformed Services and Veterans Organizations, this case is of grave importance to millions of aging veterans of World War II, the Korean War and the Vietnam War. The case also directly implicates the country's ability, in the wake of the Government's broken promises, to continue to raise and maintain a volunteer career military force necessary to protect the national defense. The Government instead erroneously attempts to hide behind the doctrine of *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). Yet the question of whether the defense departments' regulations create a property right simply is not the type of judicial invasion into national defense matters that the *Mindes* doctrine was designed to prevent.

Similarly, the United States' attempt to avoid its obligations by now calling its promise a conditional privilege is unpersuasive. Gov. Br. at 12. Congress has consistently recognized that the promise was made. Indeed, contrary to the brief of the United States, Congress' most recent finding is that the Government has failed to fulfill its promises to the military retirees of the United States. *See*, H.R. Rep. No. 532, 105th Cong., 2d Sess. 314 (stating that "[t]he committee strongly believes the Administration has an obligation to fulfill the commitments made to our military retirees.").

Finally, the United States's contention that 5 U.S.C. § 301 does not support the petitioners' claim is untenable. Gov. Br. at 11. As the United States itself concedes elsewhere in its brief, 5 U.S.C. § 301 is the statutory authority upon which the De-

partment of Defense has relied in providing health care to military retirees of the United States. Gov. Br. at 6. The government simply cannot have it both ways. Moreover, the United States should be embarrassed to recall that there has never been any issue as to the Department of Defense's authority under this statute to provide health care. Congress has long recognized this authority not only as it pertains to retirees of the Armed Forces of the United States but also as it pertains to the extension of health care by the Department of Defense to foreign dignitaries, including foreign military members. *See* Hearings on CHAMPUS and Military Health Care Before the Subcomm. No. 2 of the House Comm. on Armed Services, 93rd Cong., 2d Sess. 139-140 (1974).

CONCLUSION

This case is of utmost importance to the millions of men and women who need the medical care that the Government promised but later took away. The Government contends that petitioners' years of dedicated service to their country has earned them no more than "we're the Government and we do not need to keep our word." This response hardly justifies the sacrifices that petitioners and millions like them have made in defense of the United States. Review by this Court is necessary to ensure that neither petitioners' sacrifices nor the promises made by this country were made in vain.

Respectfully submitted,

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